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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 114

MANUEL VACA, et al., As Officers and Members of
NATIONAL (UNITED) BROTHERHOOD OF
PACKINGHOUSE WORKERS,
Petitioners,

vs.

NILES L. SIPES As Administrator of the ESTATE
OF BENJAMIN OWENS, JR., Deceased,
Respondent.

**RESPONDENT'S ANSWER BRIEF TO BRIEF FOR
PETITIONERS AND BRIEFS OF
AMICUS CURIAE**

PRELIMINARY MATTERS

For patent economic reasons, Respondent respectfully requests that this Court refer to "Respondent's Answer Brief to Petition for a Writ of Certiorari," filed in this case, which respondent asks leave to incorporate herein by reference (together with the Respondent's two briefs filed

in the Kansas City Court of Appeals and used in the Supreme Court of Missouri—also on file with the Clerk of the Supreme Court of the United States). This Answer Brief must, perforce, be somewhat telegraphic in content, but the points are expanded in the briefs mentioned. References to "Transcript of Record" will be marked "T".

QUESTIONS ACTUALLY PRESENTED BY THE CASE

1. Does a State Court have jurisdiction to try an action, and award actual and punitive damages, by a member against a Labor Union, where the action is based upon pleading and proof (not based upon discrimination) that the Union, as the member's agent, breached a collective bargaining agreement with his employer of which the member was one beneficiary, by arbitrarily and without just cause or excuse (and thus with legal malice) refusing to carry the member's grievance against the employer (failure to restore member to work after recovery following a voluntary layoff by reason of illness) through the fifth (arbitration) step of a grievance procedure set forth in the bargaining agreement (see opinion of Supreme Court of Missouri, en banc (T. 216, last sentence))?

STATEMENT SUPPLEMENTAL TO PETITIONERS'

Again, Respondent respectfully requests incorporation herein, by reference, of his "Statement Supplemental to Petitioners" starting at page 2 of Respondent's Answer Brief to Petition for a Writ of Certiorari.

It should be added, also that Owens had been working 12 to 14 hours a day, off and on, for the whole 16 years of his employment (T. 71); that the doctor said his whole trouble was that he was too fat and that he then took off 50 pounds (T. 15); that he "didn't have no heart attack, I just only just felt bad, I was tired" and decided to take

a rest-up (T. 15); that Owens refused to go to the rehabilitation place as "that was for people that was completely damaged." (T. 59). Owens' grievance was withdrawn by petitioners in the fourth step without notice or consent by him and about one month before trial of this case (T. 138, 142, 148), although they had copies of statements, that Owens was qualified to go back to work, from five reputable doctors who "were not questioned by the Company" (T. 141, 142). The \$300.00 was not for "costs" but for Vaca to represent Owens (T. 30) and such a request by a union official was considered by a union official as "outrageous" and "improper" (T. 127, 128). The Executive Board of the union voted to go to arbitration (T. 94).

In its opinion, the Supreme Court of Missouri did not decide the case solely on the ground that Owens had a meritorious grievance, but based the determination upon the arbitrariness and legal malice shown by all facets of the evidence (e.g. \$300.00 "lug" request (T. 208), refusal of the union to communicate with Owens' attorneys (T. 209), failure to notify Owens of withdrawal of grievance by Petitioners (T. 209), plus a meritorious grievance, etc.).

The Union had asserted that Owens' grievance was meritorious (should be put back to work) right up into the fourth step (T. 135), urging among other things, that one of the two doctors relied upon by the employer (Dr. Morris) had never seen Owens (T. 147).

SUMMARY OF ARGUMENT

This case is a simple one for actual and punitive damages growing out of an arbitrary and malicious breach of agreement by the Union to represent Owens' (an internal Union matter), as his agent in processing Owens' grievance against his employer, for wrongful refusal to restore him

to his work after he had successfully taken a voluntary lay-off to rest up and take off weight so that he would feel better. It is not based upon discrimination or an unfair labor practice, but solely upon breach of the duty of an agent faithfully, without arbitrary or malicious refusal, to act to represent his contractual principal. Efforts to twist and torture this into an action under the federal statutes concerning discriminatory acts are not in accord with the pleadings, the evidence and the submission to the jury.

The opinion of the Supreme Court properly sustains the Respondent, taking the evidence most favorable to Respondent as true, under the jury's verdict; and it is in accord with the guide lines of this Court in the *Gonzales, Carey, Dowd, Humphrey, Russell, Linn, Lucas, Smith, LaBurnam* and other cases.

The basic and sole premise of petitioners is that the case is based upon a *discriminatory* unfair labor practice by the petitioners; this is fallacious; arbitrary and malicious breach of an agent's contractual duty in an internal union matter is the foundation of the case. Both compensatory and punitive damages (not available in a Board proceeding) are proper.

The NLRB expressed itself, upon inquiry in this case, as not available for granting relief unless *discriminatory* action (absent here) was present.

ARGUMENT

Once more, as in "Preliminary Matters," Respondent asks the indulgence of the Court and requests reference to pages 5 through 20 of his "Answer Brief to Petition for a Writ of Certiorari."

The petition at trial level in no way pleads discrimination by an unfair labor practice; in the evidence and in the submission to the jury, there is likewise no mention thereof. As the opinion of the Supreme Court of Missouri holds, this is an uncomplicated action by an agent against his principal, under Missouri state law, for arbitrary and malicious failure to perform the principal's contractual duty, in an internal union matter to represent Owens in processing his grievance against his employer for failure to return him to work after he had successfully consummated a voluntary rest-up period from work entailing 12 to 14 hours daily labor.

The propriety of the action, judgment and opinion of the Supreme Court of Missouri, en banc, is attested to by the holdings of this Court and the guidelines there described in such cases as: *International v. Gonzales*, 356 U.S. 617; *Carey v. Westinghouse*, 375 U.S. 261; *Dowd v. Courtney*, 368 U.S. 502; *Humphrey v. Moore*, 375 U.S. 335; *International v. Russell*, 356 U.S. 634; *Linn v. United*, 86 S. Ct. 657; *United 174 v. Lucas*, 369 U.S. 95; *Smith v. Evening News*, 371 U.S. 195; and *United v. LaBurnam*, 347 U.S. 656.

The Supreme Court of Missouri, in its instant opinion, and properly in its own orbit, held actual and punitive damages to be proper under the law of Missouri (not in conflict with federal law and not pre-empted thereby *under the facts herein*). Punitive damages are recognized for malicious actions, in such cases as *International v. Russell*, *supra*. The inability of the NLRB to give complete or adequate relief is apparent, since it cannot award punitive damages or loss of future earnings and fringe benefits (e.g., in cases where the employee may, after the grievance was perpetrated, have died or become disabled). These factors are considered of moment by this Court in *Gonzales*, *supra*, and elsewhere.

It is noted that petitioners in their brief, throughout, admit that the agent must always act subject to complete good faith and honesty of purpose (not arbitrarily or maliciously) in the exercise of its discretion (their Brief pages 24, 25, 34, 37 and 38), *even* in discrimination cases. This is especially necessary in those cases, as in simple principal and agent cases, where an exclusive representation agreement (as here, page 26 of Petitioners' Brief) is involved. Petitioners surely will not go so far as to argue that arbitrary and malicious conduct is consonant with good faith and honesty of purpose. Yet the jury held that the evidence showed such conduct and the highest court in the state (ruling under Missouri law as to this point, see *Erie v. Tompkins*, 304 U.S. 64, 78) sustained the jury's verdict. This is much more than understandable with the evidence of a meritorious grievance in which the agent acted as follows: abandoned by Petitioners after they had believed in its merit through the fourth step presentation; balking only at the *first step where a neutral arbiter would hear the grievance* (arbitration); demanding an "outrageous" and "improper" "lug" of \$300.00 as a prelude to continuing; refusing to continue to arbitration even though the Executive Board had so decided; refusing to answer the inquiries and requests for action of Owens' attorney; and arbitrarily, without knowledge of or notice to Owens, about five weeks before this trial, withdrawing his grievance completely. Is this a picture consistent with an agent's good faith and honesty of purpose, and does it indicate a decision made within a wide range of reasonableness!

Even were this a discrimination matter, Petitioners present an ambivalent position as to whether an action will lie where a union fails in its duty as an agent, stating that a "suit" will lie (pages 16, 28, 50 of its Brief), but else-

where plumping for pre-emption by the NLRB (pages 15 and 39 of its Brief). Still, however, it ignores the basic and unchanged holding of this Court in *Gonzales, supra*, as to the field outside of the Board-pre-empted area, in which the original jurisdiction of the State Courts has not been disturbed.

CONCLUSION

Thus, petitioners having misconceived the basis of the instant action, their Brief, founded entirely upon a discriminatory picture is inapropos to the situation here presented.

As to Material Cited by Petitioners

The following points are noted in cases and material cited by petitioners in their "Brief for Petitioners," in addition to those discussed on page 14 *et seq.* of "Respondent's Answer Brief to Petition for a Writ of Certiorari."

At page 26 *Palnau*, 301 F. 2d 702, is cited; it restates the law, *hn.* 7, page 705, that individual rights of employees under a collective bargaining agreement may be adjudicated in a State Court, citing *Dowd, supra*.

At page 48 Petitioners cite *Elgin*, 325 U.S. 711, in support of the proposition that an individual may sue his employer for a grievance growing out of breach of contract; if he may so sue his employer, of course, it is even more logical that he may sue the union for failure so to act for him. Petitioners admit this apparently, in their top paragraph, page 28, where they state that federal law (but not forum) governs where a collective bargaining agreement action is brought in a state court.

On page 41, petitioners again speaking under their discrimination premise, discuss the reversed *Miranda* NLRB

decision. Yet in Owens' case, he checked with the NLRB but found that it would not entertain his grievance against a union unless discrimination was a factor (T. 195, 196).

On page 44, petitioners admit that "state courts may remedy certain types of violations of state law even though the same conduct may be an unfair practice," citing *Russell, LaBurnam, Linn and Smith, supra*, and even giving recognition (though quite cavalierly) to *Gonzales*—the leading and decisive case under these facts.

On page 45, they admit in their last full paragraph, that no opportunity was ever given to the State Courts to rule upon the appropriateness of an award of damages—since no challenge thereto was made. There thus is no issue on that score at this stage

CONCLUSION

While respondent applauds the historical and explanatory elements of the large portion of petitioners' Brief, as constituting a well-written treatise on labor relations, he must suggest strongly that the portion purporting to relate to the facts in this case is founded upon the entirely baseless and fallacious premise that this action is based upon a violation of a federal statute against unfair labor practices involving discrimination. Instead, the basis is an action founded upon violation of State law as permitted and authorized by this Court in *Gonzales, Carey*, and many other cases. It is urged that Certiorari be denied.

Respectfully submitted,

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October, 1966.

SUPPLEMENT AS TO SWIFT AND CO. BRIEF

Respondent again, for obvious economic reasons, respectfully requests that this court consider page 21 of his Answer Brief to Petition for Writ of Certiorari as incorporated herein, by reference.

ARGUMENT

This case was brought and submitted under the common law, not as a discriminatory action, but as a breach of contract by an arbitrary and malicious failure by an agent to represent his principal. The standard is arbitrary and malicious action. A definite standard of the common law for assessment of liability is reiterated (not "set up," since this has always been the common law standard) by the Supreme Court of Missouri, i.e., an agent is liable to its principal for *arbitrary* and *malicious* failures properly to represent the principal ("discrimination" was nowhere pleaded or submitted in the case; see opinion page 215, Transcript of Record). The employer's effort is to twist the nature of the proceeding away from its true basis, recognized by the highest court of the state of Missouri as an action under the common law for wrongful (arbitrary and malicious, not discriminatory) breach of the union's contractual duty as respondent's agent to represent its member (an occurrence involving the internal operations of the Union), attempting to effect a metamorphosis into a discriminatory (favoring one over another) action.

The employer's Brief, therefore, like the others, is based upon a begged question and a false one. The standard here is not discrimination *vel non*, but arbitrary and malicious common law failure by an agent faithfully under its contract, to represent a principal (see discussion of *International v. Gonzales*, 356 U.S. 617 on pages 211-216, Transcript of Record).

The Missouri Supreme Court's opinion found that in addition to Owens' good submissible case for retention on the job, there were such matters of importance as facets of arbitrary and malicious action by the agent as the \$300.00 "lug," failure to communicate with Owens' attorney (and in the evidence, in addition, are matters such as overruling the vote of the board of directors of the Union, etc.). The opinion did not "set up" as a standard the good submissible case against the employer as the sole criterion of arbitrary and malicious action (see Transcript of Record, pages 208, 209 re "lug", failure of Union to communicate with respondent, and page 94 as to Board Decision to go to Fifth step).

CONCLUSION

The common law standard for wrongful failure by an agent to represent his principal by reason of arbitrary and malicious acts was the basis of the Missouri Supreme Court decision.

SUPPLEMENT

As to A.F.L.-C.I.O. Brief

Once more, Respondent respectfully requests this court to consider pages 23 and 24 of his Answer Brief to Petition for Writ of Certiorari, as incorporated herein by reference.

SUMMARY OF THIS ARGUMENT

This Amicus Curiae Brief, like the others, attempts to twist and transmute a simple common law action for wrongful (arbitrary and malicious) failure by an agent faithfully to represent its principal (in an internal union matter) into a *discriminatory* action based upon violation of specific federal statutes. The Brief's premise thus being

false, its involved and at times rather obscure arguments based thereon also are unsound. *International v. Gonzales*, 356 U.S. 617, is the solid basis of the Missouri Supreme Court's Opinion and the facts of the case and the opinion fall directly under the holding of this court in the *Gonzales* case. The arguments of the AFL-CIO Brief, even on such false premise, lack integrity in that on pages 3, 4, 5 and 12 of that Brief they take positions that respondent can maintain his action, while contrari-wise nimbly announcing that they are preparing to jump in reverse upon a later anticipated legal occasion.

The "Standard of Liability" argument is covered in "Respondent's Argument as to Swift and Co. Brief," immediately preceding this argument.

While a union has reasonable latitude in refusing to process a grievance if *acting in good faith*, as the Brief asserts, this very statement implicitly includes that it may not so refuse if acting arbitrarily and maliciously as to a just grievance.

The argument is still based upon the false premise that this is a "discriminatory" action. Punitive damages have always been allowable by courts as punishment and deterrents at common law, in cases involving arbitrary and malicious acts; even were this a discrimination case, the absence of power in NLRB to award such relief is a strong justification for the use of Courts in cases warranting it.

ARGUMENT

The Missouri Supreme Court's opinion (see preceding Answer to Swift & Co. Brief) made crystal clear that this was a common law action justified under the expressions in *Gonzales* and not one based upon violation of or under

specific federal statutes. Discrimination was not pleaded, proved, or submitted; arbitrary and malicious failure by an agent (the union) to do its duty to this principal under a contract (internal matter of the union) was the hoof and horn of the case. While the admissions by the Brief are that respondent is wrong, but may be right here, and that the writer will contend at a later occasion that respondent's position is correct under the federal statutes (confusing, to put it mildly) such support as this affords respondent still rises from a false foundation (discrimination action vis-a-vis common law breach of contractual agency duty). Throughout, it must be remembered that the NLRB is on record that discrimination must be shown to have been caused by the union before there is a violation of Section 8(a) (3) NLRA (Transcript of Record, Page 195).

The "standard of liability"—arbitrary and malicious failure to act as a faithful agent—is neither novel nor incorrect. Previous argument on this point need not be reiterated.

The Brief plumps for single jurisdiction of a "dispute", page 23, in the NLRB while admitting the sterility of the Board's power to give complete relief, its inability to enjoin, to award punishing or deterrent sanctions, and otherwise to protect employees against just such arbitrary and malicious actions (\$300.00 "lug", overruling the union Board's Decision, refusal to communicate with the employee, etc.) as occurred here. It wishes, it says, to avoid "forum shopping," while seeking to locate all remedies, even for wrongful, intentional, arbitrary, wanton, and malicious actions its union or others may choose to take against their own members to a body which it happily asserts can do nothing to punish such actions.

On page 34, the Brief cites Equal Employment Opportunity Law as an example of federal desire not to use punitive action to control tyrannical type actions by labor unions. However, the quotation discloses the reverse, for the law provides that a *Court* for an unlawful employment practice may order back pay for an employee "payable by the *labor organization* * * * responsible for the unlawful employment practice" (Emphasis added).

Again, using the false "discrimination" premise, the Brief speaks of the *good faith* latitude of a union to refuse to process grievances. But this "good faith" is implicit in the discretionary power, and the arbitrary and malicious absence thereof is the crux of the liability involved in the instant case. Citation by the Brief of *ex parte* figures of cases "settled" (no showing how many or few were "dropped") adds nothing to the picture, for the overriding question would be whether those "dropped" were dropped arbitrarily or maliciously like the Owens' grievance. If they were, the victim should have a remedy, and punitive action should be available.

CONCLUSION

The false premise of the Brief is "discrimination". This action, however, is a common law action for faithless failure by an agent, based upon arbitrary and malicious acts falling directly under the *Gonzales* holding. The punitive feature is properly available to courts, but missing from the NLRB's powers.

As to Material Cited by AFL-CIO, Amicus Curiae

The following points are noted in cases and material cited by Amicus Curiae, AFL-CIO, in their Brief, in addition to those discussed on pages 22 *et seq.*, of "Respondent's Answer Brief to Petition for a Writ of Certiorari"

At page 4, they admit that a state court may entertain a "suit" under federal statute for breach of the bargaining agreement, even though the breach is also an unfair labor practice; of course, this is fine, as far as it goes, but in *Gonzales*, etc., this Court puts its imprimatur also upon common law actions like the instant one.

On page 11, they cite *Local 357 v. NLRB*, 365 U.S. 667, again, a case dealing with discrimination. It may be noted that Mr. Justice Clark described "discrimination" as meaning to "distinguish" or "differentiate." Of this, there was no evidence in the instant case.

On page 12, they join the petitioners in taking ambivalent positions; they boost the theory that breach of duty of fair representation is arguably an unfair labor practice, while admitting that elsewhere they claim the reverse. By "arguably" they must mean that because *anyone* (they in this instance) argues the point antithetically, it enters that category. The term must mean more than that. It must mean that the point may be logically argued with reasoning of substance. Otherwise, everything is "arguable." In the instant case, the point is moot.

On page 19, they admit that "breach of contract is not itself an unfair labor practice" and on page 20, cite *Smith*, *supra*, that even if violation of the duty of fair representation is an unfair labor practice, the action for breach of contract (this is such an action) is cognizable in State Courts.

On page 28, they cite *Atkinson*, 370 U.S. 238. There this court held that an action under §301 LMRA (not the case here) is controlled by federal law whether brought (violation of bargaining agreement) in either federal or state courts.

CONCLUSION

For the reasons suggested above, it is again urged that certiorari be denied.

SUPPLEMENT

As to Material in the Solicitor General's Brief

This Brief, *amicus curiae*, requested by this Court of the Attorney General, appears to adopt and range itself almost completely with that filed by AFL-CIO; therefore, the Court is respectfully referred to respondent's adversions to these points in his Brief. While the position of such a formidable office is most impressive to respondent, speaking, as it states, from its position "expressing the views of the United States" (though we should have considered it to be only of the *Executive Branch*), still, the law of the *Gonzales* and other cases remains undisturbed by the arguments in the Brief—this, for the reasons advanced earlier herein. Although an attorney with the NLRB is on the Brief, the position in which he appears now to join was not the position of the NLRB when Owens, in timely fashion, originally requested light thereon (T. 195, 196, and Solicitor General's Brief, p. 32), and they stated that the only cases of which they would take cognizance were those involving *discrimination*.

The following statement in the Brief, as to the evidence the jury considered, requires limited correction: on page 4, the testimony (T. 30) was that the Local President wanted \$300.00 "to represent me for the fifth step," not "for the cost of arbitration" (also T. 154).

Respondent respectfully disputes the Brief's p. 6 statement that neither the complaint (petition) nor the State Court opinions stated the legal nature of the claim—the petition was drawn (T. 1, 2 and 4) as for a breach of the

contract by an agent faithfully to represent his principal (a common law duty), and the Missouri Supreme Court opinion followed this characterization (T. 215, 216). While, as the Brief states, p. 8, there is a federally created statutory duty, it has not, of course, deleted the ancient parallel common law responsibility. "Rank hath its privileges; and rank hath its responsibilities." The Brief, like the others, is chained to the incorrect premise that the petition, instructions and verdict are based upon an unfair labor practice by discrimination, based upon the LMRA. It also disregards the touchstone of the Missouri Supreme Court opinion, that the standard for assessing the common law liability is arbitrary and malicious conduct.

On page 15, the Brief asserts that the "complaint" alleged in substance that the union "unfairly" represented Owens. The quoted word (a word of art in this climate), however, does not appear in such a frame.

As to Owens' letter to the NLRB, p. 15, Note 7 of the Brief, it was written during the period when his attorney was unable to secure any answers from petitioners as to the status of his grievance.

Possibility of differences in findings as to matters handled in divergent jurisdictions occurs in cases in all courts of the Nation and its States; yet this is controlled, in reason, by appellate procedures and has never been suggested as a reason for centralizing all litigation of the Nation and States in a single Board or Juridical Body—the logical terminus of the Brief's argument.

On page 21, the Brief makes a most important admission, which goes to the very fundamentals of the case, i.e. that "were there a contractual standard," formulated by the union, the *State court would have jurisdiction*. Owens pleaded such a contractual situation (T. 2) and violation

of the contractual duty to represent, by refusal "to pursue further the just claim" (T. 4). Petitioners' own testimony on this score was accepted by the jury, to the effect that petitioners had the *duty* faithfully to represent the employees in any grievance against the employer, without charge (T. 113) under the Union rules (T. 114).

Respectfully submitted,

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APPENDIX**Respondents' (Petitioners Here) Motion for Re-Hearing in
Supreme Court of Missouri**

Comes now respondents and respectfully move the court to set aside its decision and opinion herein and grant a rehearing of this cause on the following grounds:

1. Because the Court in holding that the alleged conduct of the respondents or defendant union could not be argued to constitute an unfair labor practice in violation of Section 158, of the Labor Management Relations Act, as amended (29 U.S.C.), the Court has failed to follow, and its opinion and decision are in conflict with, *Ironworkers v. Perko*, (1963) 373 U.S. 701; *Plumbers' Union v. Borden*, (1963) 373 U.S. 690; *Hughes Tool Company*, (1953) 104 N.L.R.B. 318; Administrative Ruling of N.L.R.B. General Counsel (1960) 47 L.R.M. 1034; Administrative Ruling of N.L.R.B. General Counsel (1961) 47 L.R.R.M. 1226-1227; and Administrative Ruling of N.L.R.B. General Counsel (1961) 47 L.R.R.M. 1602-1603; and Local 12, United Rubber Workers, 1964, C.C.H.N.L.R.B., §13,655, wherein it has been held that the wrongful refusal by a labor organization to handle or process a grievance constitutes an unfair labor practice under the aforesaid act, and which said decisions and propositions therein announced are decisive of this case, and which were duly submitted by counsel for the respondents at pp. 12, 14-16, 18-23, 24, 26.

WHEREFORE, respondents respectfully pray that their motion be sustained and a re-hearing granted.

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